STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on August 16, 1977.

COMMISSIONERS PRESENT:

Edward Berlin, Acting Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Charles A. Zielinski

CASE 26494 - NEW YORK STATE CABLE TELEVISION ASSOCIATION - Investigation of Pole Attachment and Related Agreements Between Utilities and CATV Systems

ORDER GRANTING IN PART AND DENYING IN PART PETITIONS FOR REHEARING OF OPINION NO. 77-1

(Issued August 26, 1977)

BY THE COMMISSION:

Consolidated Edison Company of New York, Inc., Central Hudson Gas and Electric Corporation, General Telephone Company of Upstate New York, Inc., Highland Telephone Company, Niagara Mohawk Power Corporation, Sylvan Lake Telephone Company, New York State Cable Television Association, New York Telephone Company, Rochester Gas and Electric Corporation and Rochester Telephone Corporation have petitioned for rehearing of Opinion No. 77-1 which required each electric and telephone corporation doing business in New York State to file proposed pole attachment agreements which the utility intends to offer on a nondiscriminatory basis to all cable television operators legally entitled to do business within its service territory. The Order also required that each proposed agreement include, or be accompanied by, the utility's procedures for scheduling makeready work.

Jurisdiction

Rochester Telephone and General Telephone argue that the Commission is incorrect in its assertion of statutory jurisdiction based on Sections 91, 92 and 97 of the Public Service Law. In light of the arguments raised in the petitions, we have reviewed the question of our jurisdiction. We find first that the petitioners' arguments, which mirror those previously advanced, do not merit an alteration of our position. We do take this occasion to note that Sections 5 and 2(18), while not expressly cited before, bear directly on our assertion of jurisdiction.

Section 5 of the Public Service Law, Jurisdiction of Public Service Commission, states, in pertinent part:

> 1. The jurisdiction, supervision, powers and duties of the public service commission shall extend under this chapter:
>
> d. To every telephone line which lies wholly within the state and that part within the state of New York of every telephone line which lies partly within and partly without the state and to the corporations owning, leasing, or operating any such telephone line.

Section 2, Definitions, states in pertinent part:

> 18. The term "telephone line" when used in this chapter, includes conduits, ducts, poles,. . .used, operated or owned by any telephone corporation to facilitate the business of affording telephonic communication.

Reading Section 5(1) in conjunction with Section 2(18), it is clear that the Commission has jurisdiction over "telephone lines" which are defined to include "poles" owned

by the telephone corporation to facilitate telephonic communication. Plainly the situation under consideration comes within the scope of this definition.[1/]

Petitioners[2/] assert that we have misconstrued Cerrache Television Corporation v. Public Service Commission, 267 N.Y.S.2d 969 (Supreme Court, Sp. T., Albany County, 1960), Solomon v. Public Service Commission, 286 App. Div. 636 (3rd Dept., 1955), and National Merchandising Corp. v. Public Service Commission, 5 N.Y.2d 485 (1959), in asserting our jurisdiction. Rochester and General cite, in particular, the recent cases of New York Telephone Company v. Town of North Hempstead, 385 N.Y.S.2d 436 (1976), and New York Telephone Company v. Public Service Commission, 38 N.Y.S.2d 524 (1976). The former concerns a rental fee imposed by New York Telephone on North Hempstead for the attachment of street lights to telephone poles. There, the Supreme Court, relying on Cerrache, refused to accept the argument that the rates demanded constituted a "unilateral charge" imposed without the approval of the PSC. It is irrelevant since we agree with the petitioners that leasing does not involve over-the-line communication for which tariff filings are mandated. The latter case, concerning yellow pages advertising, relies on Solomon and National Merchandising to find a lack of Commission jurisdiction because of the failure to demonstrate discrimination among customers. But again, petitioners' reliance is misplaced for telephone poles certainly are not analogous to yellow pages advertising.

1/A similar argument can be made for "electric plant," Section 5(1)(b), and its definition, Section 2(12). Section 2(12) does not mention "pole," as such, but does refer to "devices. . . for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat or power." Electric poles obviously qualify under this language.

2/Rochester Telephone, General Telephone, Niagara Mohawk and New York Telephone.

Niagara Mohawk argues that the business of telephone pole attachments is comparable to the appliance business over which we exercise no jurisdiction. But, in our view, poles are not at all comparable to appliances. The former are essential ingredients in the provision of utility and, now, CATV service, while the latter are employed by the ultimate customer.

New York Telephone argues that we erred because we asserted "discretionary jurisdiction" over utility activities. It is true, of course, that statutory language, not our discretion, determines the existence of jurisdiction; but we may choose, in our discretion, whether or not to exercise it. And, having found jurisdiction, we have properly chosen to exercise it.

Rochester and General Telephones argue that the lack of record evidence on discrimination negates our assertion of jurisdiction under Section 91(3). The answer to this argument is stated in the Opinion: "the record recounts a number of instances in which utilities have failed to cooperate with CATV companies." In addition, we have decided to exercise our jurisdiction not only to eliminate existing discriminatory practices, but to prevent the potential for future ones as well.

In conclusion, we find that petitioners have advanced no new arguments that warrant a reversal of our assertion of jurisdiction over pole attachments.

Pole Attachment Rates

The footnote on page 8 of Opinion No. 77-1 referring to New York Telephone's estimated fully allocated costs of pole attachments, has led some of the parties to conclude that the Commission accepts these estimates as realistic.

Our intent was neither to accept nor to reject that company's fully allocated cost estimates because we have not yet evaluated the methodology or input cost data used.

Petitioners Con Edison, New York Telephone, and the Cable Television Association seem confused as to what we have, in fact, decided with regard to pole attachment rates. They will have ample opportunity in the remanded hearings to present their arguments as to our broadly stated guidelines for the setting of pole attachment rates.

Standards for Utility Pole Attachment Contracts

Makeready Work

New York Telephone argues that making greater use of independent contractors would cause labor difficulties in a period of a decreasing telephone work force. As we pointed out in the Order, we are not requiring the utilities to make use of independent contractors, but merely trying to provide an incentive to do so. Petitioner, in somewhat of a reversal also argues that a payment of 10% above the contractor's charge is not sufficient to cover its administrative costs of subcontracting. The CATV Association argues to the contrary that 10% will have a "chilling effect" on the use of independent contractors and requests that its use be explored during the remanded part of the case. Admittedly, the 10% factor is somewhat arbitrary but it was chosen to strike a balance between the recognized need to provide some incentive to utilities to engage in economical subcontracting without unduly promoting decisions to do so. We continue to believe that it strikes the proper balance. It should be noted that if there exists a genuine concern about potential labor difficulties caused by contracting out makeready work, an elevation of the 10% factor would do nothing to alleviate the problem.

New York Telephone argues that utilities should be provided a profit on makeready work, rather than having to perform it at cost. This argument fails to take note of our observation that "the annual pole attachment fee should be set somewhere between avoidable and fully allocated costs." Through this mechanism the utilities will be provided with a "profit" on the transaction viewed as a whole--makeready charges plus annual fees--even though one element will be performed at cost.

Con Edison requests that we not treat as absolute our requirement that each utility determine how many poles it can make ready per month. We have proposed no such requirement, but instead will allow each utility to decide upon its own schedule as long as it is reasonable.

Petitioners Con Edison, Cable Television Association, and Rochester Gas and Electric object to billing for makeready at the estimated cost and to the mediation process we have established for resolving estimate challenges. They argue that our procedures are unnecessary because there have been only a few instances of utility estimates being substantially out of line with actual costs. In the alternative they propose that: (1) the Commission allow the utility and the CATV company, on an individual basis, to opt out of pricing on an estimated basis and agree to actual costs; or (2) the Commission establish rates for the various functions involved in makeready work.

The first proposal would leave the situation much as it is now, while the second would result in the levelling of high and low charges, not unlike billing on an estimated basis. However, we would lose the advantage of the mediation process set out in the Order on an individual basis. It is quite clear from these petitions that the utilities and the CATV companies view each other suspiciously. This suspicion

could seriously try our staff if the mediation process is invoked indiscriminately. We will, therefore, require the utilities affected by this Order to develop charges for makeready work operations by applying broad gauge unit costing techniques, and to file a schedule of these charges with us, although not as a part of its tariff.

Rochester Gas and Electric requests clarification of our prohibition on charging for additional makeready work performed within two years of the original work. It suggests that charges should be barred only where it is the utilities' change in plans that necessitates the additional makeready within the two-year time frame. We continue to believe that only after the two-year period has run should the utilities be allowed to charge a CATV operator for additional makeready work, and then only if that makeready would not be necessary were CATV attachments not present on the pole. As we originally stated, this should induce the utilities to make careful and reasonable projections of need when planning initial makeready, while not burdening the CATV companies with the cost of all possible future utility needs. However, in no instance should CATV pay for additional makeready due to highway work, State or municipal actions, or other third party requirements, as suggested by RG&E. In the case of highway work, utilities are required to relocate poles and transfer facilities, or otherwise rearrange their plant, regardless of the presence of CATV. There is therefore no incremental cost incurred by the utility due to the presence of the CATV facility. Of course, in these circumstances the CATV companies are responsible for transferring or otherwise rearranging their own facilities. Additional makeready necessitated by State or municipal actions or other third party requirements,

to the extent possible, should be paid for by the party creating the need, not the CATV operator already attached to the pole.

Pole Replacements

New York Telephone objects to our allowing CATV companies credit for the depreciation on poles against the cost of installing new poles. This allowance will increase the investment of the utility, and, thus, it argues, will increase the burden borne by the general ratepayers. But it ignores the fact that the investment will be compensated for by new, and, presumably, improved plant.

Anchoring and Guying

New York Telephone's petition for reconsideration refers to and transmits a copy of its response to our Show Cause Order in Case 27153. Its primary objection to the guying and anchoring standards seems to be the provision that if a CATV company is unable to guy and anchor its own attachments, the utility must do it and bill for the fully allocated costs (Opinion No. 77-1, pages 15 and 16). We believe that if CATV companies can easily provide the necessary lateral support prior to making attachments, they generally do so; however, where difficulties are encountered in placing additional guys or anchors, because of private property rights, for example, CATV companies apparently often attach their cables without providing adequate lateral support. It is our understanding that CATV companies often do this with the intention that it is a temporary expedient which will be corrected as soon as whatever obstacle preventing initial anchoring or guying is removed. However, there is a potential that what was intended to be temporary will become permanent.

Attaching cables without first providing adequate lateral support is a potentially hazardous and unacceptable means of constructing plant. Our decision sought to remedy this condition by clearly imposing upon the utility the guying and anchoring responsibility.

Guying and anchoring deficiencies, along with all other types of construction violations, would be minimized if the utilities inspected CATV facilities frequently during construction. This would require CATV operators to inform utilities, on a day-by-day or week-by-week basis, of the exact locations where construction is in progress, and bear the costs of these inspections in lieu of the usual one-time initial post-construction survey. Although the cost to CATV operators of inspections during construction may be higher than for traditional post-construction surveys, the practice of some CATV operators or their contractors to expedite the provision of CATV service at the expense of utility pole line integrity must be effectively discouraged.

Accordingly, the guying and anchoring standards will be modified to allow the utilities to:

(1) Conduct frequent inspections of CATV construction in progress, in lieu of traditional post-construction surveys.

(2) Require CATV licensees, during periods when CATV facilities are being constructed, to advise them, on a day-by-day or week-by-week basis, of the exact locations where CATV plant is being placed.

(3) Prohibit attachment of CATV facilities from poles which are inadequately guyed or anchored, as determined by individual utility's published construction standards, except where prior arrangements have been made with and agreed to by the utility; if no published standards exist, then the latest revision of the National Electrical Safety Code (NESC) will apply.

(4) Require correction before operation of any CATV cables not yet providing CATV service which have been attached to inadequately guyed or anchored utility poles subject to the CATV company's right to appeal to us for unreasonable demands by the utilities.

We will not require inspections of CATV construction in progress, but urge utilities that, after all, have the responsibility for safety and reliability, to use this procedure in lieu of or in addition to the traditional initial post-construction survey. There undoubtedly are utilities and CATV operators who have experienced satisfactory results with traditional post-construction surveys alone; they will remain free to continue such mutually acceptable procedures.

If working CATV cables are found to be inadequately guyed or anchored, and if the CATV operator does not install the necessary guys or anchors within one week of notification by the utility, or such longer period as the CATV operator and utility mutually agree will be required, then the utility should move promptly to install those guys or anchors and bill the CATV operator its cost, calculated on a fully allocated basis.

Post-Construction Surveys

Rochester Gas and Electric argues that the costs of periodic post-construction surveys should be billed on a direct basis, instead of the current practice of recoupment through annual pole attachment fees, because the frequency and cost of such surveys varies widely between CATV companies. Apparently, this request is caused by the fact that some CATV operators are more responsible in their facility construction practices than others. RG&E's argument warrants altering this portion of the standards to require that

attachment rates be set to compensate the utilities only for the "normally required" periodic post-construction surveys. The term "normally required" should be defined during the remand hearings on annual attachment rates. When a utility determines it is necessary to survey more frequently than normal because CATV plant is not being properly constructed or maintained, the cost should be billed on a direct basis, provided that a significant amount of substandard attachments are discovered. This procedure strikes a proper balance: it will promote responsible construction by the CATV operators, yet discourage the utilities from conducting unnecessary surveys.

Central Hudson Gas and Electric would prefer to charge the costs of these surveys directly to CATV, rather than recover them through the annual rental fee, to promote CATV responsibility in this area. We disagree that the costs of surveys conducted to discover unauthorized attachments should be billed directly to the CATV companies. Central Hudson Gas and Electric's proposal fails to consider that a survey conducted to uncover unauthorized attachments would also uncover other violations on licensed poles caused both by the utilities and the CATV companies. Furthermore, if the utilities were permitted to bill the costs of unauthorized attachment surveys directly to CATV, they would have little incentive to conduct only those surveys which are reasonably necessary.

We believe that during normal periodic post-construction surveys illegal attachments will be discovered. As an incentive to the CATV industry to not make illegal attachments, we will consider authorizing the utilities to charge the CATV operator a penalty fee plus any makeready

work required on the pole for each illegal attachment discovered. Details relating to this charge should be explored in the remanded proceedings.

Right-of-Way Acquisition

New York Telephone incorporates in its petition its response to our Order to Show Cause, Case 27153, which directed New York Telephone to show cause why:

> it should not offer Cablevision the use of its anchors where spare capacity exists, for the purpose of guying Cablevision's attachments, without requiring Cablevision to forfeit any of the private property rights it may have pursuant to Hoffman v. Capitol Cablevision Systems, Inc. [82 Misc.2d 986 (Sup. Ct., St. T., Albany Cty., 1975) affirmed ___ A.D.2d ___ (3rd Dept., 1976)].

New York Telephone expresses the concern that allowing CATV companies to become assignees to their easement rights endangers their goodwill with private property owners, and ultimately their permission to remain on the property, where they have informal agreements. For this reason, they would prefer to develop pole attachment agreements without assigning these rights. The Hoffman situation applies where the utility is on another's property under a legal agreement. In such cases, there is no danger of the utility being forced to remove its facilities by a private property owner offended by some action of the CATV company. In non-Hoffman situations, where the utility has an informal agreement with the private property owner, there are no Hoffman rights to be assigned. For the utility to refuse to assign rights, therefore, results in an unacceptable detriment to the CATV company without any clear and overriding benefit to the

utility. For this reason, we specifically prohibit utilities from depriving CATV operators of private property rights which may be assignable to them from easements held by the utilities on licensed poles or anchors.

Attachment Agreement Filing Requirements

The proposed standards require all utilities to file pole attachment agreements which are in compliance with the standards, whether or not they currently license any CATV attachments. We have granted an exception to these requirements to Long Sault Inc. Another similar request is pending from the Fishers Island Utility Corporation. Both of these companies have no CATV operations in their territories.

We will alter the standards to require only those companies currently accommodating CATV attachments to file agreements. Any company not currently accommodating CATV attachments will not be required to file until such time as it receives an application from a franchised CATV operator for attachment rights.

The Commission orders:

1. The petitions for rehearing, Consolidated Edison Company of New York, Inc., March 30, 1977, Central Hudson Gas and Electric Corporation, May 3, 1977, General Telephone Company of Upstate New York, Inc., March 28, 1977, Highland Telephone Company, April 25, 1977, Niagara Mohawk Power Corporation, April 27, 1977, Sylvan Lake Telephone Company, April 29, 1977, New York State Cable Television Association, April 29, 1977, New York Telephone Company, April 29, 1977, Rochester Gas and Electric Corporation, May 2, 1977, Rochester Telephone Corporation, April 25, 1977, are granted to the extent consistent with this Order, and denied in all other respects.

2. This case is remanded for further proceedings consistent with the principal decision and this Order.

3. This proceeding is continued.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

§ 119-a. Attachments to utility poles; use of utility ducts, trenches and conduits

The commission shall prescribe just and reasonable rates, terms and conditions for attachments to utility poles and the use of utility ducts, trenches and conduits. A just and reasonable rate shall assure the utility of the recovery of not less than the additional cost of providing a pole attachment or of using a trench, duct or conduit nor more than the actual operating expenses and return on capital of the utility attributed to that portion of the pole, duct, trench or conduit used. With respect to cable television attachments and use, such portion shall be the percentage of total usable space on a pole or the total capacity of the duct or conduit that is occupied by the facilities of the user. Usable space shall be the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables. Added L. 1978, c. 703. Effective immediately.